No. 43006

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

GEORGE F. COLLINS, JR., *Plaintiff in Error,*

vs.

OKLAHOMA TAX COMMISSION, *Defendant in Error.*

BRIEF OF PLAINTIFF IN ERROR

Statement of the Case

May It Please The Court:

This is a direct appeal from an order of the Oklahoma Tax Commission denying a protest against assessment of additional income tax and interest in the total amount of $21,770.60 for the taxable year 1959 (C-m. 38, 61-63).

The issue is whether Plaintiff in Error's transfer of legal title to 26,592 shares of stock of Liberty Glass Company to his former wife, pursuant to a property settlement agreement incident to an Oklahoma divorce, was a taxable event (a "sale or exchange"), or was a non-taxable division of jointly acquired property of husband and wife. Decision of the issue must turn on Oklahoma law as to the rights of the parties in property jointly acquired during marriage.

Plaintiff in Error's position is that Oklahoma law requires a ruling that transfer of legal title to the Liberty Glass stock to the wife was a non-taxable division of property jointly acquired during the marriage.

Plaintiff in Error filed an income tax return for the year 1959 in which he reported adjusted gross income in the amount of $94,858.57 and paid tax in the amount of $2,528.93 (C-m. 32, 37). On February 1, 1968, The Commission issued a proposed assessment by which it added the sum of $256,012.40 to the adjusted gross income and proposed an assessment of additional tax in the amount of $14,809.93 and interest thereon in the amount of $6,960.67 (C-m. 37, 38).

Plaintiff in Error filed a written protest (C-m. 38). All the facts were stipulated. (C-m. 2, 3, 28). After a hearing the Tax Commission sustained the assessment (C-m. 61-63). It was paid under protest (C-m. 64) and Plaintiff in Error timely filed a notice of intention to appeal directly to the Supreme Court (C-m. 65).

Commission's Findings:

The Commission found that the assessment of additional taxes should be sustained. It held that Plaintiff in Error's transfer of 26,592 shares of the stock of Liberty Glass Company to his former wife pursuant to a property settlement agreement incident to an Oklahoma divorce was a taxable event resulting in an increase in his income for the year 1959 in the amount of $256,012.40. The Commission based its ruling on the decision of the United States Court of Appeals for the Tenth Circuit in *George F. Collins, Jr.* v. *Commissioner of Internal Revenue,* 388 F.2d 353 (C.A. 10th 1968). That Court held that under Oklahoma law the transfer of the title to the stock was a "sale or exchange of prop-

erty" rather than a division of jointly owned property and based its opinion on its interpretation of Oklahoma law. The Commission found that the same rule of law applied to Plaintiff in Error's Oklahoma income tax return as the U. S. Court of Appeals applied to his Federal income tax return (C-m. 61-63).

Applicable Statutes:

68 O. S. 1951, Sec. 883 provides (in part)

"(a) For the purpose of ascertaining the gain derived, or loss sustained, from the sale or other disposition of property, real, personal, or mixed, the basis shall be the cost thereof * * *.

* * *

"(d) (1) The amount realized from the sale or other disposition of property shall be the sum of any money received, plus the fair market value of the property (other than money) received; and the taxable gain or deductible loss shall be the difference between such amount and the basis provided in subsections (a) and (b) * * *.

"(2) In the case of an individual the following percentages of the gain or loss recognized upon the sale or other disposition of a capital asset (computed under the provisions of subsection (a) * * * shall be taken into account in computing net income:

* * *

"Fifty per centum (50%) if the capital asset has been held for more than twenty-four (24) months.

* * *

"(e) Upon the sale or exchange of property, the entire amount of gain or loss (except as provided in paragraph (2) of subsection (d) of this section) shall be recognized, except in the case of reorganization, merger, consolidation, liquidation of a wholly owned sub-

sidiary corporation, or the organization of a corporation, the stock or securities received shall be considered to take the place of property transferred, and no gain or loss shall be deemed to arise therefrom, if immediately after the exchange the same person or persons are in control of the corporation, and the stock or securities received by each is substantially in proportion to his interest in the property prior to the exchange. In the case of any tax free reorganization, merger, consolidation, liquidation of a wholly owned subsidiary corporation, or organization of a corporation, as herein provided, the basis for determining profit or loss upon the sale or disposition of the property shall be the same in the hands of the transferee as it was in the hands of the transferor. * * *"

12 O. S. 1951, Sec. 1278 provides:

"Disposition of property—Restoration of wife's maiden name—Alimony. When a divorce shall be granted by reason of the fault or aggression of the husband, the wife shall be restored to her maiden name if she so desires, and also to all the property, lands tenements, hereditaments owned by her before marriage or acquired by her in her own right after such marriage, and not previously disposed of, and shall be allowed such alimony out of the husband's real and personal property as the court shall think reasonable, having due regard to the value of his real and personal estate at the time of said divorce; which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or in installments, as the court may deem just and equitable. As to such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just

and proper to effect a fair and just division thereof. In case of a finding by the court, that such divorce should be granted on account of the fault or aggression of the wife, the court may set apart to the husband and for the support of the children, issue of the marriage, such portion of the wife's separate estate as may be proper."

Abstract of Record

George F. Collins, Jr., Plaintiff in Error (hereinafter referred to as George), married Beverley R. Lorton (hereinafter referred to as Beverley) on July 2, 1942. Beverley, a widow, had a son born in 1937 of her first marriage, whom George adopted. She possessed assets not in excess of $10,000 in value when she married George. Three children were born of the marriage of George and Beverley, all of whom were minors in 1959 (C-m. 39).

Plaintiff in Error was a principal stockholder and during the marriage was in active charge of the business and affairs of Liberty Glass Company, a corporation (C-m. 39).

Beverley was not employed in George's business enterprises during her marriage to him, but she entertained business visitors frequently at home and attended conventions with her husband where she helped in the entertainment of customers and others with whom Liberty had business relationships. Some of these individuals were also personal friends and acquaintances of George's and Beverley's. Beverley was interested in the success of her husband's business enterprises (C-m. 39). She made every effort to conduct herself in such a manner as to assist her husband in his business efforts. George often discussed his business activities with her (C-m. 40).

On April 20, 1959, George and Beverley, having decided

they could not continue their marriage relationship, entered into an agreement settling their property rights and providing for alimony and support for Beverley, custody of the children and their support and maintenance (C-m. 40).

The agreement provided for George's support of Beverley by stating that he should pay Beverley $40,000 per year for ten years, $35,000 per year for the next ten years and $30,000 per year thereafter for life. Support for the three children of the marriage provided for $175 per month per child plus educational and extraordinary medical expenses (C-m. 40-42).

The agreement also provided for a division of property, consisting of a payment of $110,000 in cash, transfer by George to Beverley of 26,592 shares of common stock of Liberty Glass Company, all life insurance which George owned on the life of Beverley, a Country Club membership, and certain automobiles and furniture. Under this agreement Beverley was to transfer to George all life insurance owned by her on his life and all her common stock of Red Ball, Inc., an Oklahoma corporation (C-m. 40-42).

Beverley filed a petition for divorce from George in the District Court for Tulsa County, Oklahoma on April 21, 1959. This petition alleged in part:

> "That said defendant is possessed of large amounts of property which has been acquired by the parties jointly during their marriage but which property stands in the name of the defendant; that said defendant is also possessed of considerable property in his own right and that he has a substantial income from earnings each year."
>
> * * *
>
> "Wherefore, plaintiff prays that she may be divorced from her said husband by reason of the fault of the said

defendant as aforesaid; * * * that the Court make just and equitable division of the property acquired by the parties jointly during said marriage; that she be allowed alimony out of the property and earnings of the defendant in such amount as shall be equitable and just; and that said defendant be required to pay to her reasonable amounts for the support of their said children; * * *" (C-m. 42).

George entered his general appearance and answer on April 28, 1959 in which he stated in part:

"Said defendant further states that the Plaintiff and this defendant have entered into an Agreement for the division of property and payment of alimony, subject to the approval of this Court, in the event a divorce is granted, which Agreement this defendant requests the Court to approve and which Agreement will be submitted to the Court for approval at the time of the trial of this action" (C-m. 42).

The District Court entered a decree of divorce in favor of Beverley on April 28, 1959. The District Court found, among other things, that

"6. * * * at the time of the marriage, plaintiff [Beverley] was not possessed of any lands, tenements and hereditaments owned by her, and that defendant's estate consisted largely of an inheritance of real, personal and mixed property, including but not being limited to a controlling interest in various business enterprises and corporations, most of which interests he still owns and of which he is now possessed; that the defendant always has provided liberally and abundantly for his wife and children in full keeping with his property and affairs, their station in life, and their prominent position in the community; that it is defendant's continuing wish and desire, even though the legitimate ends of matrimony can no longer be supported by and between the parties, that his family continue to enjoy the comforts,

conveniences and advantages in life to which they have become accustomed, so far as defendant's property and affairs will reasonably permit, and should prove equitable and just, having due regard:

a) To the long years the parties have been married;
b) That the marriage was one of love and affection and not one of convenience on the part of either party;
c) To the valuable contributions made by plaintiff to the marriage and to the success and growth of defendant's business enterprises and to defendant's happiness while the parties hereto were compatible.

"7. Pursuant to the considerations aforesaid the parties hereto did, on the 20th day of April, 1959, enter into a written agreement, subject to the Court's approval, for the purpose of adjustment and settlement of all claims to alimony by the plaintiff whether allowed to her in real or personal property, or both, or as same might be decreed to her in money, payable either in gross or in installments, and as to such property, whether real or personal, as may have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties and for the further purpose of setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof. The Court further finds that the plaintiff herein desires to accept the rights granted her in said Agreement in lieu of all claims of every kind or nature which she might have against defendant, including, but not being limited to any rights she may have to alimony, maintenance, support or division of property and that she desires to accept the same in full and complete settlement of all statutory rights vested in her pursuant to Title 12, Section 1278 of the Oklahoma Statutes. The Court, upon examination of said Agreement and being otherwise well and sufficiently advised as to the property affairs and rights of the parties to the marriage, finds

that said Agreement is fair, reasonable and just and should be approved and that the said Agreement should neither be incorporated in, merged in, nor superseded by this decree but should remain in full force and effect hereafter (C-m. 43)."

On May 1, 1959, George and Beverley each made the transfers of property to the other called for in the agreement. The 26,592 shares of Liberty common stock transferred by George to Beverley constituted 16.62 percent of the total outstanding stock of Liberty and had a basis in George's hands of $19,815.19 on May 1, 1959 (C-m. 43). At that date the shares had a fair market value of $20.00 per share (C-m. 48).

The consolidated net worth of Liberty and its subsidiaries increased from $973,955.23 on December 31, 1942, to $5,425,509.40 on December 31, 1958 (C-m. 45).

Assignments of Error

I. The Tax Commission erred in finding that there was any additional income tax due for the year 1959.

II. The Tax Commission erred in not finding that the Plaintiff in Error had paid all income tax due the State of Oklahoma for the year 1959.

III. The Tax Commission erred in entering the order and making assessment for additional income tax against George F. Collins, Jr. for the year 1959.

IV. The Tax Commission erred in finding that any additional income taxes were due and owing to the State of Oklahoma for the year 1959 and in making an order assessing such tax so found against George F. Collins, Jr.

V. The Tax Commission erred in holding that when Plaintiff in Error transferred 26,592 shares of stock in Liberty Glass Company to his former wife in a property settlement agreement as a division of jointly acquired property during marriage, that the transfer constituted a sale or exchange of property and resulted in taxable gain to Plaintiff in Error under the provisions of 68 O. S. 1951, Sec. 883, or any other provision of the Oklahoma Statutes.

Argument and Authorities

Our argument, with supporting authorities, will be presented under these propositions:

I.

The transfer of the legal title to the Liberty Glass Company stock was not a taxable sale or exchange, but was a non-taxable division of jointly acquired property of husband and wife.

II.

The Tax Commission erred in deciding this case on the authority of *Collins* v. *C.I.R.*, 388 F.2d 353 (C.A. 10th 1968). With all due respect to that Court, it misconstrued Oklahoma law.

I.

The transfer of the legal title to the Liberty Glass Company stock was not a taxable sale or exchange, but was a non-taxable division of jointly acquired property of husband and wife.

This is a matter of Oklahoma property law. Taxability or non-taxability is governed by that law.

By statute and a long history of case law the property rights of parties to a divorce action in Oklahoma are clearly defined.

Here is the statute (12 O.S. 1951, Sec. 1278):

"When a divorce shall be granted by reason of the fault or aggression of the husband, the wife shall be restored to her maiden name if she so desires, and also to all the property, lands, tenements, hereditaments owned by her before marriage or acquired by her in her own right after such marriage, and not previously disposed of, and shall be allowed such alimony out of the husband's real and personal property as the court shall think reasonable, having due regard to the value of his real and personal estate at the time of said divorce; which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or in installments, as the court may deem just and equitable. As to such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof. In case of a finding by the court, that such divorce should be granted on account of the fault or aggression of the wife, the court may set apart to the husband and for the support of the children, issue of the marriage, such portion of the wife's separate estate as may be proper. R.L. 1910, §4969."

This statute was derived from Kansas, *Vanderslice* v. *Vanderslice*, 195 Okla. 496, 159 P.2d 560 (1945). Kansas cases, therefore, are of persuasive force.

It is immediately apparent that the statute recognizes these distinct classes of property of parties to a marriage.

1. Separate property of the husband, which may be subjected to payment of alimony to the wife if there be fault or aggression of the husband. (First sentence.)

2. Separate property of the wife, which may be subjected to child support if there be fault or aggression of the wife. (First and last sentences.)

3. Property acquired by the parties jointly during the marriage, whether title thereto be in either or both, to be divided between them. (Second sentence.)

The stock of Liberty Glass Company, although brought into the marriage by George, was jointly acquired property because of its increase in value during the marriage. The increase was almost six-fold (C-m. 45). *Moyers* v. *Moyers*, 372 P.2d 844 (Sup. Ct. Okla. 1962); *Williams* v. *Williams*, 428 P.2d 218 (Sup. Ct. Okla. 1967). This enhanced value of the stock transferred to Beverley is the gain on which the tax here involved is based.

This Court has clearly established the nature of a spouse's interest in jointly acquired property.

Its character is "very similar in conception to the community property of community property states [and] is regarded as being held by a species of common ownership", *Thompson* v. *Thompson*, 70 Okla. 207, 173 Pac. 1037 (1918). There may be a division even if the divorce is not granted, as the wife "has a vested interest in such property which she does not forfeit even though her course cannot be justified and she is entitled to her proper share of such property," *Davis* v. *Davis*, 61 Okla. 275, 161 Pac. 190 (1916). "The plain purpose of that provision [Section 1278] "is that the prop-

erty be so divided that the portion awarded to one would be free from the claims or domination of the other, a complete severance of *the common title*", *Kupka* v. *Kupka*, 190 Okla. 392, 393, 124 P.2d 389, 391, (1942) (Italics supplied); *Lawson* v. *Lawson*, 295 P.2d 771 (Sup. Ct. Okla. 1956). The statute deals with "title to the common property," *Trosper* v. *Trosper*, 308 P.2d 320 (Sup. Ct. Okla. 1957). And "although the quantity of the jointly acquired property to be awarded each party is discretionary with the trial court, the nature of the estate is not a matter of judicial discretion", *Williams* v. *Williams*, supra.

In *Catron* v. *First National Bank and Trust Company of Tulsa, Executor, et al.*, 434 P.2d 263, 276 (Sup. Ct. Okla. 1967) this Court said:

> "We recognize that in divorce proceedings and certain cases of intestate succession a wife, *by virtue of statutory enactment*, becomes entitled to certain rights *in property acquired by joint industry during coverture.* 12 O.S. 1961, §1278; 84 O.S. 1961, § 213(2). In circumstances in which the cited statutes are applicable, the performance of a wife's customary duties during coverture is sufficient to entitle her to the benefits provided by these statutes. *In re Stone's Estate*, 86 Okla. 33, 206 P. 246; *Tobin* v. *Tobin*, 89 Okla. 12, 213 P. 884." (Italics supplied)

In the *Williams case, supra*, this Court also said at page 222:

> "The rules governing trial courts' determination of the equitable division of jointly acquired property in divorce cases under §1278, supra, have been expressed innumerable times. The equitable division mentioned in the statute does not mean an equal division. *Tobin* v. *Tobin*, 89 Okl. 12, 213 P. 884; *Moyers* v. *Moyers*, Okl., 372

P.2d 844. And, in *Van Horn* v. *Van Horn*, 189 Okl. 624, 119 P.2d 825, we said that although an equal division of the property was not required, the statutory requirement means what it says—an equitable division."

"The equitable division of property contemplated by our statute relates solely to jointly acquired property. *Champion* v. *Champion*, supra, *Funk* v. *Funk*, Okl., 319 P.2d 599. A divorce obtained for fault of the husband relinquishes the wife's right to any interest in the husband's separate property, except for alimony and support of minor children." See Bruce v. Bruce, 141 Okl. 160, 285 P. 30."

And as late as this year, this Court again gave clear directives regarding the division of property jointly acquired during marriage. (*Bouma* v. *Bouma*, 439 P.2d 198, 200 (Sup. Ct., Okla. 1968)):

"The principles governing trial courts in effecting equitable division of jointly acquired property under 12 O.S., 1961, § 1278, have been expressed innumerable times. Regardless of which spouse is granted divorce, the paramount requirement is that the court effect the fair and equitable division called for by the statute.

"The court's duty primarily involves determination, upon equitable grounds, of the extent of each party's rights in the property in view of their respective conduct and efforts as the contributing factors. Upon this basis we have stated: '* * * Hence the question of need affords no criterion and the matter of personal conduct is material only to the extent it may reflect the existence or nonexistence of that endeavor which contributed to the creation of the estate.' See *Hill* v. *Hill*, 197 Okl. 697, 174 P. 2d 232, p. 234; *Movers* v. *Movers*, Okl., 372 P.2d 844; *Tobin* v. *Tobin*, 89 Okl. 12, 213 P. 884, 889.

"The basis of the quoted principle was adopted from the Kansas decision of *Bowers* v. *Bowers*, 70 Kan. 164,

78 P. 430, from which jurisdiction our statute was adopted. In *Bowers, supra,* that court, differentiating between alimony and property division provided in the statute, declared that alimony was based upon maintenance only, whereas property division has for its basis the giving to each party that portion of the property justly and equitably due without regard necessarily for necessities of the case. We recognized and adopted this distinction in *Davis* v. *Davis,* 61 Okl. 275, 161 P. 190. Although of controlling effect, this principle frequently is lost sight of in disposition of the affairs of the marital community. Thus, when attempt is made to provide a divorced spouse with maintenance, based partially upon need, to be accomplished by division of jointly acquired property without fixing alimony, confusion and inequities inevitably result."

Nevertheless, *Bowring* v. *Bowring,* 196 Okla. 520, 166 P.2d 415 (1946) holds that in the division of property, among other things, financial ability and custody and maintenance of children should be considered. In *Shook* v. *Shook,* 352 P.2d 376 (Sup. Ct., Okla., 1960) in making the division the Court considered the fact that the husband was awarded custody of the children and must support them. The Court of Appeals for the Tenth Circuit commented on these cases in holding that for Federal tax purposes the transfer of Liberty Glass stock was a taxable event.

The *Bowring* and *Shook* cases, *supra,* are not in harmony with the numerous pronouncements of this Court that need of the parties furnishes no criterion for the division. The latest is *Bouma* v. *Bouma, supra,* (see above quotation from this case) which follows the doctrine of *Moyers* v. *Moyers, supra, West* v. *West,* 268 P.2d 250 (Sup. Ct., Okla., 1954) and *Hill* v. *Hill,* 197 Okla. 697, 174 P.2d 232 (1946) and these must be deemed to state the law of Oklahoma.

It has been settled Oklahoma law—for many years—that there may be an action and judgment for division of jointly acquired property either separately or combined with an action for divorce. *Allred* v. *Allred*, 131 Okla. 55, 267 Pac. 842 (Sup. Ct. 1928) collects many of the cases.

Note also, the *Williams* case, *supra*, establishes the rule that the divisions of property under Section 1278 relates solely to jointly acquired property, and divorce for the husband's fault relinquishes the wife's right to any interest in the husband's separate property, except for alimony and support of children.

Section 1278 provides for division, in whomever title may be. Such division has been made where title was in the wife. *Thompson* v. *Thompson*, *supra*, *Moyers* v. *Moyers*, *supra*.

In view of these pronouncements of the law, it seems clear that a division of property under Section 1278 is not a sale, or exchange, or even a "disposition", by the spouse who holds title to the property. There are two bases for this.

Here is the first. Immediately upon the acquisition of the jointly acquired property, each spouse's interest in it is vested for all purposes except descent. The division is not an award to one spouse of the separate property of the other who holds title. It is not in satisfaction of any personal obligation of one to the other, but is in recognition of existing property rights as such. It is a determination, quantity-wise, of the right in the jointly acquired property, and a breaking apart of the "common ownership," "the common title," and "title to the common property." Now, prior to the actual division, the quantum of the wife's interest is indefinite, but so is the husband's, "whether the title thereto be

in either or both." If uncertainty of the quantum of interest prevents vesting, then there is no vested interest in either party. That the titleholder has powers of management, control and disposition does not prevent vesting. An agent may exercise such rights without ownership. If the property is disposed of by the husband or wife, the proceeds of the disposition are jointly acquired property. In legal theory each spouse has possession and enjoyment of his or her particular interest. *The decisive factor is actual ownership, and not who holds the legal title.* See Section 1278, *supra.*

The second basis, is that at the latest, the interest vests when marital discord occurs, the parties come to a parting of the ways, and claims are asserted to the property jointly acquired. It is not necessary that there be a decree of divorce; see the *Davis* case, *supra,* saying the wife had a vested interest in the property. Indeed there may be a separate action for such division, *Allred, supra.* In brief, at the latest the interest vests at the time rights are asserted under Section 1278. Need is no criterion and fault does not destroy the right.

Additionally, and applicable to both of the aforesaid bases, the general rule is that an estate in property may be vested although the amount the owner is to receive depends upon a future event or determination. Instances are joint tenancies, certain remainders and gifts or devises to a class. This Court has ruled there may be a vested interest in a contingent remainder where the only contingency is the happening of the event on which the remainder is to take effect, *Moore* v. *McAlester,* 428 P.2d 266 (Sup. Ct., Okla. 1967). And under a will devising a life estate to a daughter, with remainder to her issue, the remainder vests in the only issue living, subject to being reopened to let in those after born,

even though trustees had power to sell the property, Franklin v. *Margay Oil Corp.*, 194 Okla. 519, 153 P.2d 486 (Sup. Ct. 1944).

Jones v. *Farris*, 180 Okla. 341, 69 P.2d 344 (Sup. Ct. 1937) (relied on by the Court of Appeals) does not weaken, but supports these conclusions. It holds the wife's interest is not vested in the sense that her children inherit that interest if the wife predeceases her husband, who had the legal title, *there being no divorce proceeding.* This Court said at page 342 of 180 Okla. and page 346 of 69 P.2d "whatever rights were available to the wife to assert or resolve an interest in the jointly acquired property were never by her exercised * * *." Those rights are exercised when marital discord occurs, as above noted.

As between George and Beverley, there was marital discord, there was a parting of the ways, and Beverley asserted her statutory rights. After negotiations, the settlement agreement was made (C-m. 40) and pursuant to it title to the Liberty stock was transferred to her. The transfer of title was not a sale, or exchange, or disposition within the purview of the income tax statute (68 O.S. 1951, Sec. 883) or otherwise, and no income tax is payable on account of it.

Direct authority for this conclusion is found in two cases.

Swanson v. *Wiseman* (Civil No. 8478, U.S.D.C., W.D. Okla., Feb. 23, 1961, 7 A.F.T.R. 2d 824, 61-1 U.S.T.C. 79,633) contains this pronouncement at page 825 of 7 A.F.T.R. 2d and page 79,634 of 61-1 U.S.T.C.:

> "Oklahoma law concerning the property of husband and wife recognizes three classifications thereof:

1. The separate property of the husband.
2. The separate property of the wife.
3. Property jointly acquired during coverture.

These classifications are recognized in 12 Oklahoma Statutes (1951) Section 1278, which deals with the distribution of property on divorce and pursuant to which the divorce decree relative to this case was entered.

> "The property distributed under the divorce decree, including the stock here in question, was not the husband's separate property [although it was in his name] but according to the language of the divorce decree, was property jointly acquired by the couple during coverture. Thus, distribution of the stock under the divorce decree constituted *a division of jointly acquired property and did not constitute a taxable transfer of the husband's separate property to the plaintiff in satisfaction of her marital rights.*
>
> "* * * the property received by plaintiff under the divorce decree was property in which she had a right *upon divorce* of the parties. 12 Oklahoma Statutes (1951) Section 1278." (Brackets and italics supplied)

Cofield v. *Koehler*, 207 F. Supp. 73 (D. Kan. 1962), holds non-taxable a transfer by a husband to his wife of his interest in U. S. bonds under a decree of divorce. The Court said at page 74:

> "The effect of the divorce decree did no more than set apart to each in severalty the interest they owned in their community property. They gained nothing and they lost nothing."

The Tax Commission's holding that George transferred *his property* to Beverley when he assigned the Liberty stock to her is in direct conflict with Oklahoma statutes and the decisions of this Court. Under the statute and those deci-

sions, there was nothing more than a division of property jointly acquired during marriage, there was no transfer of ownership by George, and hence no transaction to which a tax could attach.

II.

The Tax Commission erred in deciding this case on the authority of Collins v. C.I.R., 388 F.2d 353 (C.A. 10th 1968). With all due respect to that Court, it misconstrued Oklahoma law.

The Tax Commission's decision rests solely on the authority of the above cited case. That case holds the transfer of title to the stock here involved was taxable under the Federal income tax statutes. The tax was $128,046.20. Collins has filed a petition for certiorari in the Supreme Court of the United States. We hope to have an opinion in the case at bar before that petition is ruled on.

The opinion of the Court of Appeals is based on *U. S.* v. *Davis,* 370 U.S. 65 (1962) construing a Delaware statute and *Pulliam* v. *C.I.R.,* 329 F.2d 97 (C.A. 10th 1964), construing a Colorado statute and following the doctrine of *U. S.* v. *Davis, supra,* and on its interpretation of Oklahoma law as being not substantially different from the law of Delaware and the law of Colorado. On this last point, we think the Court erred.

We will further discuss the opinion, but its fundamental error is epitomized by the statement that: "Many states confer the power upon divorce courts to transfer to the wife, *property of the husband*" (emphasis ours) and the conclusion that such is the true effect of the jointly acquired property provisions of Section 1278. (388 F.2d at 357). This is at total war with the decisions of this Court.

The Court of Appeals admitted, as it must under *U. S.* v. *Davis, supra,* that state property law is controlling (388 F.2d at 355).

U. S. v. *Davis, supra,* held taxable a transfer of stock from a husband to his wife in connection with a divorce granted to residents of Delaware. The husband contended the transfer was a division of property under Delaware law. The Court rightly held Delaware law must be examined. It found the Delaware statute did not establish any semblance of property rights in the wife.

A comparison of the Delaware and Oklahoma statutes amply demonstrates that the decision in the *Davis* case, *supra,* does not control the case at bar. The Delaware statute has no provision as to property jointly acquired during marriage, or the division thereof. Further:

Delaware Statutes provide (Title 13, Section 1531):

> "When a divorce be decreed for the aggression of the husband, the complainant shall be restored to all her real estate, * * *"

Oklahoma Statutes (Title 12, Section 1278) provide:

> "When a divorce shall be granted by reason of the fault or aggression of the husband, the wife shall be restored to her maiden name if she so desires, and also to all the property, lands, tenements, hereditaments owned by her before marriage or acquired by her in her own right after such marriage * * *"

Delaware (continuing):

> "and allowed, out of her husband's real and personal estate, such share as the courts think reasonable. * * *"

Oklahoma (continuing):

> "and shall be *allowed* such *alimony* out of the husband's real and personal property as the court shall think reasonable, * * *" (italics supplied)

Note the distinctions in the last two quoted comparisons. In Delaware, the property division came directly out of the *husband's* property, whereas in Oklahoma, it is only *alimony* which comes out of the husband's property.

Continuing after the above quoted portions of the statutes of both states, there is nothing in common in the statutory provisions. Delaware has ended its provisions relating to a division of property by providing for the wife to get a part of the husband's property and under that provision, the *Davis* case, *supra,* was decided (and correctly so), holding that the husband's property was so burdened with an obligation or charge that the satisfaction thereof made the transfer of property from him to her a taxable transaction.

Contrast the continuance of the Oklahoma statute dealing with property jointly acquired during marriage, with respect to which Delaware has *no such provision* and gives no recognition to the legal concept of such type of property.

In the *Davis* case, *supra,* the Court said at page 70 of 370 U. S.:

> "Regardless of the tags, Delaware seems only to place a burden on the husband's property rather than to make the wife a part owner thereof * * * but certainly this happenstance does not equate the transaction with a division of property by co-owners."

The Court went on to examine other aspects of Delaware law (rights to convey and succession) and found the wife had no rights whatever in the property which the husband conveyed to her.

The Court further said at p. 70 of 370 U. S.:

"* * * Upon dissolution of the marriage she shares in the property only such extent as the court deems 'reasonable.' 13 Del. Code Ann. §1531(a). What is 'reasonable' might be ascertained independently of the extent of the husband's property by such criteria as the wife's financial condition, her needs in relation to her accustomed station in life, her age and health, the number of children and their ages, and the earning capacity of the husband. See, e. g., *Beres* v. *Beres*, 52 Del. 133, 154 A.2d 384 (1959)."

Contrast this with the language of this Court in the application of Sec. 1278, *supra*, where, in *Hill* v. *Hill, supra*, it is said at page 698 of 197 Okla. and page 234 of 174 P.2d:

"The duty of the court in making division of property jointly acquired during marriage involves primarily merely the determination on equitable grounds of the extent of the right of each therein in view of their respective conduct and efforts as the conducive or contributing factors. Hence the question of need affords no criterion and the matter of personal conduct is material only to the extent it may reflect the existence or nonexistence of that endeavor which contributed to the creation of the estate. * * *"

The needs or other measures referred to in Delaware have no application and afford no criterion in Oklahoma, the *only* test in Oklahoma being a fair and equitable division based upon the joint efforts of the respective parties.

Pulliam v. *C.I.R., supra*, construed a Colorado statute which provides for alimony or a division of property. There is no provision in Colorado law as to jointly acquired property. *U. S.* v. *Davis, supra*, was followed. Some of the factors

considered by Colorado law are clearly not considered under Oklahoma law, such as the duty of the husband to maintain and support the wife, whether the wife brought any property into the marriage and the husband's earning capacity. (See footnote 13 at 388 F.2d 357.) In Oklahoma those factors have to do with alimony, not property division. The Court noted that:

> "* * * The only inchoate right of any consequence the wife has in Colorado is, if she survives her husband she may reject provisions he makes for her in his will and take instead one-half of his estate."

In Oklahoma the wife possesses not only a right as a forced heir, but also the rights set out under our first proposition as to property jointly acquired during marriage. *Pulliam, supra,* also ruled the liability of the husband leading to a property division was "more in the nature of a personal obligation" (329 F.2d 97-98) and thus taxable. *Pulliam, supra,* is a far cry from the case at bar.

If what we have said under our proposition I is valid, and we contend it is, Oklahoma law is substantially different from the law of Delaware and the law of Colorado, and neither *U. S.* v. *Davis, supra,* nor *Pulliam* v. *C.I.R., supra,* is controlling.

Further emphasizing the distinction is the Oklahoma rule that property in the wife's name may be divided between her and her husband. *Thompson* v. *Thompson, supra; Moyers* v. *Moyers, supra.*

Finally, the Court of Appeals in *Pulliam, supra,* labored what it deemed to be lack of traditional ownership rights in property, "descendible interest, right to control and disposition of the property and vested interest." (388 F.2d 357-8).

In view of what has been said, we think this analysis is not accurate.

Further, the property here involved is not a traditional class of property but is, instead, provided for by statute (Section 1278). With all due respect, the Court of Appeals confused transfer of legal title with transfer of ownership.

The Tax Commission erred in deciding this case on the authority of *Collins* v. *C.I.R., supra.*

CONCLUSION

It is too obvious for argument that no tax consequences flow from the receipt by one party from another of title to property which the recipient already owned. This case is as simple as that.

It seems to us to fly in the face of reason to say that under Oklahoma law the transfer of legal title here involved was a sale or an exchange or a taxable disposition of property.

The order of the Tax Commission should be reversed.

Respectfully submitted,

Garrett Logan
Donald P. Moyers
William A. Goffe
920 Nat'l Bank of Tulsa Bldg.
Tulsa, Oklahoma 74103

Attorney for Plaintiff in Error

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing brief and receipt of a copy thereof is hereby acknowledged by Defendant in Error this 1 day of July, 1968.

/s/ Albert D. Lynn
Attorney for Defendant in Error